LIM HENG HOOD

v.

METROMIX SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[COMPANIES WINDING-UP NO. D3-28-43-92]
21 APRIL 1992

COMPANY LAW: *Winding-up petition - Just and equitable grounds - Minority shareholder - Whether petition an abuse of the process - Application of principle in Ebrahimi v. Westbourne Galleries.*

In 1987 the 1st respondent company was incorporated with the petitioner and the 2nd respondent being virtually the joint owners of the company with 2nd respondent owning almost 2/3 of the equity and petitioner the other 1/3. The company is a partnership in the guise of a corporation. Initially there was complete trust between the partners. The petitioner was running the day to day aspects of the business. However the 2nd respondent had a significant control over the goings on of the company in that he was a mandatory signatory to cheques issued by the company.

Eventually there was a deterioration of the trust and confidence between the petitioner and 2nd respondent. Deadlock between them came into existence.

On 23 January 1992, the 2nd respondent caused a writ to be issued pursuant to which an injunction was granted. The petitioner responded to this by applying to set aside the orders and filed a winding-up petition. Further the petition was advertised the day after it was served.

The applicant (the 2nd respondent) now sought to strike out the s. 218(1) petition as being *mala fide* and an abuse of the process order. The advertising of the petition had no *mala fide* intentions. It had been advertised some 3 weeks after interim receivers and managers had taken over the company as a result of the 2nd respondent's application for a Court order of the same. Anyone "even remotely interested" in the company would have already known of the company's troubles by then.

Held:

[1] There was an *Ebrahimi v. Westbourne Galleries* type of situation which entitles any of the partners to move the Court for a winding-up order under s. 218 of the Company Act.

[2] In all probability the balance of convenience between staying the petition or the writ action will be found to be in favour of staying the writ action which could be proceeded with if necessary after the disposal of the petition which if 2nd respondents's contentions are found proven, will no doubt result in a dismissal of the petition.

[2nd respondent's application dismissed with costs.]

Cases referred to:
Ebrahimi v. Westbourne Galleries Ltd. [1972] 2 All ER 492 ***(foll)***
Charles Forte Investments Ltd. v. Amanda [1963] 2 All ER 940 ***(not foll)***
Apirami Sdn. Bhd. v. Tamil Nesan (M) Sdn. Bhd. [1986] CLJ (Rep) 279 ***(not foll)***
Abnash Kaur [1974] 44 Comp. Cas. 390 ***(not foll)***

Legislation referred to:
Companies Act 1965, ss. 181, 218, (1)(i)

For the petitioner - R.R. Sethu; M/s. R.R. Sethu
For the respondent - C.V. Das (Mohan with him); M/s. Shook Lin & Bok

JUDGMENT

VC George J:

This is an application to strike out a s. 218(1) petition as being not *bona fide* and an abuse of the process. It was dismissed with costs.

The applicant the above named Chong Kwek Kim holds 65.9% and the petitioner Lim Heng Hood 32.9% of the issued shares of the company Metromix Sdn. Bhd., which the petitioner seeks by the petition to have wound up relying on s. 218(1)(i) of the Companies Act, that is on the ground that it is just and equitable that it be wound up.

The petitioner says by the petition that in effect the company is a partnership in the guise of a corporation. That Chong and Lim are the substantial shareholders and the other 6 shareholders are employees of the corporation who between them own only 1.2% of the shares is consistent with that contention. The evidence disclosed in the various affidavits that have been read in this matter suggest that the probabilities are that the Court would, if and when it directs its mind to make a finding, find that in effect the company is a partnership the partners of which being Chong & Lim.

The petitioner says that Chong lives in Singapore and does not travel to Kuala Lumpur although the business of the company is in Kuala Lumpur. Chong however has to countersign all cheques issued by the company. He has ceased to trust Lim. Lim and Chong have ceased to be on talking terms. Lim by his affidavit and by affidavits affirmed by others supporting his cause, goes into great detail of various incidents that he and his supporters say took place which he brings to the Court's attention as being supportive of his contention that a state of deadlock has arrived in the management of the business of the company.

Relying on the principles stated in *Ebrahimi v. Westbourne Galleries Ltd.* [1972] 2 All ER 492 Lim invokes, contending that he has a right to so invoke, s. 218(1)(i) of the Companies Act to seek an order to have the company wound up as being the just and equitable thing to do.

Chong in turn, in reply to the affidavits filed and read on behalf of Lim, has caused to be filed and read a number of affidavits, his own and others of persons supporting him. Chong and his supporters also go into great details in accusing Lim *inter alia* of gross misconduct, including misappropriation of company's moneys, misapplication of company's moneys, creating a credit crunch, causing suppliers of the company not to deal with the company, causing banks to withdraw the support of the company and causing the company to come to a standstill. Chong goes on in effect to suggest that Lim's strategy was to give himself an excuse to have the company wound up so as to enable him to thereafter start his own business similar to that the company has been doing so that he could use the information and contacts he had made in Metromix Sdn. Bhd., for his own purposes. It seems to me that what Chong and his supporters have to say about the goings on in the company confirms the contention (albeit not necessarily for the reasons given by Lim) that there has come to be a state of deadlock in the management of the company.

For Chong it was quite correctly pointed out in submission by learned Counsel that there is a distinction between striking out for not having a reasonable cause of action and striking out on grounds of abuse of process. Counsel went on to state "Ours is a case of abuse of process".

It does indeed appear that since the main ingredients necessary for a *Ebrahimi v. Westbourne Galleries* situation that is a quasi partnership that has come to a standstill because of a deadlock situation, will in all probability be found to exist, it cannot but be said that the petitioner has not founded his petition on a reasonable cause of action.

It is also clear following what was said by Lord Cross in *Ebrahimi* (at p. 507 of the report) that if what is contended by Chong is proven the Court in hearing the petition could very well hold that Lim has not approached the Court with clean hands and in any event the breakdown of the relations between the parties was because of his misconduct. Such a finding could result in the Court dismissing the petition even if in fact Lim succeeds in proving the said main ingredients on which the petition is based.

Chong & Lim apparently were school fellows and were at University in Singapore at the same time. They had been good friends. Chong having had a measure of success in business brought in Lim into the Kuala Lumpur end of the business. In 1987 Metromix Sdn. Bhd., was incorporated with eventually Chong and Lim being virtually the joint owners of the company with Chong owing almost 2/3 of the equity and Lim the other 1/3. Apparently there was complete trust between the partners. Lim appears to have been running the day to day aspects of the business in Kuala Lumpur particularly after an acid attack on Chong that resulted in his not being able or not being willing to travel to Kuala Lumpur from Singapore where he resides. However, he seems to have had a significant control over the goings on in Kuala Lumpur in that he was a mandatory signatory to cheques issued by the company. Eventually there was a deterioration of the trust and confidence that Chong had *vis-a-vis* Lim. With that, particularly with Lim being the man on the spot, it was inevitable that there would be the deadlock that apparently came into existence.

Perhaps because of that, Lim appears to have thought that the situation called for the company to be sold as a going concern or at least for Lim's shares to be sold. Chong appears to have suspicions that Lim had maneuvered the situation so that he had an excuse to ask for the company to be sold but Chong appears to have gone along with the idea perhaps reluctantly. However, for one reason or the other, nothing came out of the attempts to have the company "sold" or for Lim's share to be taken over.

Lim appears to have come to the conclusion that Chong was in fact not prepared to find a solution to the problem that the partners faced, was thwarting the attempts to have a sale effected, was thwarting the finding of a solution to the impasse that Lim says that come into existence. He threatened to go to Court and have the company wound up unless the solution of "selling" the company or of Lim's shares was effected. By a letter dated 15 January 1992 he wrote:

> It is clear that you have no intention of carrying on this business. The mutual trust between us is gone. The reconciliation reached last August between us does not hold any longer.
>
> The company's operation have come to a standstill with no supply of materials caused by non payment of bills. All the suppliers are making demands. It is not possible for me to bear this situation.
>
> The time has come for a split. If I do not hear from you in the next few days about the terms of the split, I will have to seek legal advice to petition for a winding up of the company and to appoint receivers to manage it in the meantime.
>
> Kindly let me know your proposal. I am also willing to sell out to you or to a third party at a fair price.

By another letter dated 18 January 1992 Lim wrote:

> I am not precipitating a credit crunch: it is you who are doing and have done so. As I had indicated I have withdrawn my guarantees. I have also made it clear that it has become quite impossible for us to carry on and all that remains is that we have to part our ways. We had bad experience in the middle of last year. The events are still fresh in mind. If, as I have already stated earlier in my letter of 15 January 1992, no satisfactory solution is reached, I would have to proceed with the petition for winding-up of the company.

One Alvin Choong whose affidavit encl. (26) was read says that apparently in response to Lim's said letter of 18 January 1992 he was contacted by one Lim Ming Jee the brother-in-law of Chong who had been brought into the company by Chong. Lim Ming Jee apparently told him that Chong would be interested in buying out the petitioner.

According to Alvin Choong, on 20 January 1992 Lim Ming Jee called him up to discuss the issue of the take over by Chong of Lim's shares saying that Chong wanted a list of the assets and cash flow of the company to which apparently Alvin Choong expressed surprise that Chong did not "know these things". He further reminded Lim Ming Jee that if Chong was making an offer to take over Lim's shares, Lim wanted that offer in writing.

The petitioner says that in the circumstances, presumably including what he had been told to Alvin Choong, he was going to wait a week from 18 January 1992 the date of his last letter to Chong to enable Chong to come up with an offer. If no solution was forthcoming he was going to petition the Court as soon as the week was over.

However, five days after the 18th, before the week was over, on 23 January 1992, Chong caused a writ to issue seeking *inter alia* a declaration that the defendant Lim (the petitioner here) had breached his fiduciary duties both to the company and to his co-director and co-shareholder Chong, an account, damages and an injunction restraining Lim from exercising managing powers as a director of the company. By an *ex parte* application an interim injunction was obtained and interim receivers and managers were appointed on the very day that the writ was issued.

The petitioner Lim responded to this by applying to set aside the orders and by filing the instant petition which he did on 29 January 1992.

In respect of the issue of the writ, in effect Lim states that Chong, having with the assistance of Lim Ming Jee through Alvin Choong lulled him into holding back the filing of the petition, was able to steal a march on him by causing the writ to issue before Lim could file his petition notice of his intention to do so having been given to Chong by his earlier letters.

A substantial part of the complaint by Chong in respect of the petition is that it has been filed as maneuver to subvert the damages suit filed as a result of Lim's wrongdoing - that Lim's motive is to take the issues he has been confronted with by the writ to the company Court to the intent that with a winding-up order Chong would fail to have the conduct of the suit (the 1st plaintiff in the suit being the company).

It was submitted that the filing of the petition was not *bona fide*. It was suggested that Lim could have counterclaimed in the writ action instead of filing the petition. It was contended that in fact his real complaint is oppression of a minority shareholder and his petition if it was *bona fide* should have been a s. 181 petition in which case he would not have been able to have the fact of the petition advertised without first obtaining directions from the Court. It was emphasised that Lim, with unholy haste, had the petition advertised the day after it was served on 18 February 1992.

Against these submissions it was *inter alia* said, in my opinion with some merit, that in a counterclaim you could not get an order to wind up the company. It was further submitted that it was not a situation that should be confined to an oppression of a minority shareholder case but called for a *Ebrahimi v. Westbourne Galleries* type of situation. It was further submitted, again with merit, that the filing of the petition cannot be said to be something thought of in retaliation for the issue of the writ in that it cannot be denied that Chong had been given unambiguous notice that if a solution to the alleged deadlock situation was not found Lim would seek the assistance of the company Court.

As to the haste in having the petition advertised, it was pointed out that ample notice had been given to the other side of the filing of the petition a copy of it having been sent to Chong's solicitors well before the service copy had been served. The explanation given from the Bar was that the solicitors for Lim had in mind the need to get all necessary things to be done in good time to obtain the Registrar's r. 32 Certificate so that the matter could be disposed of expeditiously.

For Chong it was also contended that following the ratio in cases like *Charles Forte, Apirami Sdn. Bhd. v. Tamil Nesan,* and *Abnash Kaur* (further reference to which will be made shortly) the Court has to hold that the petition here is an abuse of the process. I do not agree. The facts here are clearly distinguishable from the situation that obtained in each of those cases. In *Abnash Kaur* [1974] 44 Comp. Cas. 390 the Delhi High Court found the petition of the petitioner who had an insignificant number of shares in the company she had petitioned to have wound up, an abuse of the process in that it had been filed:

> for putting pressure on the respondents in order to make them agree to invest in the speculative business of the appellant's brother or to pay fancy price for the shareholding of the appellant and her son, was obviously for an ulterior purpose with an oblique motive and was *mala fide.*

In *Apirami Sdn. Bhd. v. Tamil Nesan (M) Sdn. Bhd.* [1986] CLJ (Rep) 279 the petition was held to be an abuse of the process. As was the case in *Abnash Kaur*, the petition was presented by two minority shareholders. Some of what I had said in holding that the petition there ought to be dismissed as being an abuse of the process is reproduced to show that the fact situation is clearly distinguishable from that in the instant case.

> In the face of what appears to be complete answers to the various complaints of the petitioners given by the fourth respondents on behalf of all the respondents in his affidavit filed herein and the contentions wherein not having been challenged and in the light of the fact that the respondents' offer to buy up the petitioner's shares in the terms that the petitioners have sought the order of the Court being turned down and in the absence of any explanation for so doing and in the face of their conduct in filing the Civil Suit No. C4306 of 1984 and obtaining an *ex parte* interim injunction and then apparently on being challenged having it withdrawn and agreeing to pay damages for having had the injunction imposed and consenting to have the suit itself discontinued which was done in February 1985 following upon which in April 1985 having the present petition presented on the same or almost the same complaints set out in the discontinued action and eventually having advertised it withdrawing it upon the presentation of it being challenged followed by the presentation of yet another petition soon after, I am constrained to conclude that the petition is not a *bona fide* attempt to obtain the relief asked for in the petition but that its real objective was to achieve a collateral purpose which appears to be to cause embarrassment to some or all of the defendants.

As to *Charles Forte Investments Ltd. v. Amanda* [1963] 2 All ER 940 it was held (see the headnotes) that:

a winding-up petition was not the proper remedy in the circumstances of this case, particularly as the shareholder could, by bringing an action, obtain his real remedy, if he established his case, without risk of inflicting possibly irreparable damage on other innocent shareholders, moreover, as the shareholder was very much a minority shareholder, the present case was not that of a deadlock in a quasi-partnership, as, for example, where two principal shareholders in a private company fell out and business could no longer be carried on.

Unlike those cases the position that is alleged to obtain here is that there was an *Ebrahimi v. Westbourne Galleries* type of situation which entitles any of the "partners" to move the Court for a s. 218 winding-up order. To ask for the other "partner" to either buy up the unhappy partner's shares or to have the company "sold" is a different kettle of fish from that in those 3 cases.

I have not ignored the strong possibility that it could very well have to be that either one or the other of these two proceedings, Chong's writ and Lim's petition should be stayed until the disposal of the other.

If the petition is stayed Lim will in effect be deprived of a statutory right given to him by s. 218 of the Companies Act. He cannot seek the remedies allowed him by s. 218 in a counterclaim in the writ action. If the writ action is stayed all the complaints that Chong has levelled against Lim can be brought in as issues to be tried in the petition they being relevant since if it is the misconduct of the petitioner that resulted in the deadlock situation, the Courts will dismiss the petition with costs.

In my judgment in all probability the balance of convenience between staying the petition or the writ action will be found to be in favour of staying the writ action which could be proceeded with if necessary after the disposal of the petition which if Chong's contentions are found proven, will no doubt result in a dismissal of the petition.

Much was made of the haste with which the petition was advertised. It seems to be suggested that doing so had sinister *mala fide* intentions. I have however not seen that the advertising that was done, as it was done, called for what was attempted to be made of it. The advertisement gives the world notice of the petition. The affidavits filed suggest beyond any doubt that all those concerned with business dealings with the company must have been well aware that the company was in serious trouble - the quarrel between the two partners must have become common knowledge of the employees of the company and of most of those who had dealings with the company. In any event, as has been seen, immediately after the writ was caused to be issued (on the same day, 23 January 1992) Chong had successfully moved the Court by an *ex parte* order to have the affairs of the company put into the hands of interim receivers and managers who *inter alia* were given the authority to "make and/or receive payments and to deal with the employees, customers and/or suppliers of the 1st plaintiff company the fulfillment of any contractual obligation ... and to operate the existing bank and other accounts of the 1st plaintiff company ..." Lim had the petition advertised some 3 weeks after the company was put into the hands of the interim receivers and managers by which time it seems to me unlikely that anybody even remotely interested in the company would not have known that the company could very well be in its last throes.

The application Encl. (10) had to be and was dismissed with costs.

Also found at [1992] 3 CLJ 1607